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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

AUG 20 1956

JACK ALDON HEWITT,

Plaintiff and Appellant,

vs.

THE GENERAL TIRE AND
RUBBER COMPANY, a corpor-
ation,

Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No. 8502

RESPONDENT'S BRIEF

HANSON AND BALDWIN

Attorneys for

Defendant and Respondent

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IN THE SUPREME COURT
of the
STATE OF UTAH

JACK ALDON HEWITT,

Plaintiff and Appellant,

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ation,

Defendant and Respondent.

Case No. 8502

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent agrees with the Statment of Facts set forth in Appellant's Brief.

STATEMENT OF POINT UPON WHICH
RESPONDENT RELIES

The appellant is not entitled to interest on the verdict returned by the jury on April 23, 1953, until paid.

ARGUMENT

At the conclusion of the evidence at the trial of the above-entitled cause, defendant moved for a directed verdict. The motion was not immediately

ruled upon but was withheld pending the jury's verdict. The verdict was for the plaintiff, whereupon defendant moved for judgment in its favor notwithstanding the verdict, which motion was granted. The mere fact that the clerk entered a judgment on the verdict before the court had ruled on the motion for a directed verdict and before the court granted the motion for judgment notwithstanding the verdict could, of course, be of no avail to the plaintiff. The clerk, performing a ministerial act, could give no validity to the verdict during the period that the court had reserved its ruling—that is, while it had the defendant's motion under advisement — nor could the clerk's judgment be of any validity as against the ruling of the court giving judgment notwithstanding the verdict.

Now the real question is: From what date was the plaintiff entitled to interest upon the judgment which the Supreme Court, in reversing the trial court, ordered to be entered on the verdict? Plaintiff claims he should receive interest from the date of the verdict while defendant contends that it is the date the judgment in favor of the plaintiff was actually entered from which interest should be computed.

Counsel for plaintiff considers the question settled by Rule 54-E of the Rules of Civil Procedure which provides:

“(e) The clerk must include in any judgment signed by him any *interest on the verdict* or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the Register of Actions and in the Judgment Docket.”

It will be noted that this rule directs the clerk to include in any judgment signed by him “*interest on the verdict* or decision from the time it was rendered”. This rule flies in the face of our statute, Section 15-1-4, which provides:

“Any *judgment* rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum.”

As the statute provides that “other *judgments* shall bear interest at the rate of 8% per annum” there can be no interest for a judgment to bear until the judgment is entered. The Enabling Act for the Rules of Civil Procedure provides that the rules “may not abridge, enlarge or modify the substantive rights of any litigant”, and Rule 54-E, which attempts to authorize the clerk to “include in any judgment signed by him any *interest on the verdict*

or decision from the time it was rendered" is an enlargement of the rights of the plaintiff and is to that extent a nullity.

Counsel cites a number of cases which he claims justify his contention that interest should be computed from the date of the verdict, but when examined none of them support him. In *Bond v. United States Railroad* (Cal.) (Pltfs. Br. P. 3) 113 P.2d 366 the statute expressly directs that "the clerk must include in the judgment entered up by him any interest *on the verdict* or decision of the court from the date it was rendered". This is the same provision contained in our Rule 54-E and the case is not authority for the construction of our statute. The same is true of the other California cases cited at PP-4-5 of plaintiff's brief. In the case of *Metcalfe v. City of Watertown*, 68 F. 859, (Appls. Br. P. 6) a Wisconsin statute provided for *interest from the date of the verdict*. In *Louisiana and Arkansas Railway Company v. Pratt*, 142 F. 2d 847 (Appls. Br. P. 6) the court held it was proper to allow interest from the date of the verdict because *Section 966 Revised Statute authorized it to be done*. In *Givens v. Missouri-Kansas etc. Railroad*, 196 F. 2d 905 (Appls. Br. PP-8-9) the court expressly relies on the case of *Louisiana et. Railway Co. v. Pratt* and allows interest from the date of the verdict presumably for the same reason given by the court in that

case, and in *Wright v. Paramount Richards Theaters, Inc.*, 198 F. 2d 303 (Applts. Br. P. 11) the Givens case is relied on as authority. These Federal cases therefore are really based upon Section 966 which authorizes the computation of interest from the date of the verdict. The last case cited by counsel, *Yarno v. Hedlund, etc. Co.* (Cal.) 237 P. 1002 (Applts. Br. P. 12) is not authority in this case because, as before stated, the California statute expressly directs that interest be computed from the date of the verdict.

Let us now call the court's attention to authorities that *are* in point. As before stated, Utah has no statute which allows interest from the date of the verdict in a personal injury case, and Rule 54-E, cannot confer a right to interest from that date. The statute controls the rule and interest can only be computed from the date of the judgment.

The allowance of interest is purely a statutory matter. It can make no difference that there is a delay between the date of the verdict and the date of the entry of the judgment, for a defendant has a right at all stages to contest the validity or amount of the verdict, and the mere fact that the plaintiff is unable to collect the amount of his verdict because of proceedings on appeal or otherwise, does not confer upon him any right to claim interest from the date the verdict is rendered, and this is especially

true when the verdict is set aside, or its effectiveness suspended, as in this case. Here there was neither verdict nor judgment for the plaintiff until the Supreme Court reinstated the verdict and ordered judgment thereon. This question of the right to interest has been before many courts and it has been repeatedly held that where the statute does not expressly allow interest to be computed from the date of the verdict, interest is not allowable from such date.

“Where plaintiff recovers a verdict for slander and a motion for new trial was not disposed of until the following term, when it was overruled and judgment entered on the verdict; held: the trial court erred in adding interest from the date of the verdict to the date of the judgment since the recovery was not on a claim bearing interest and there was no statutory authority for interest on verdicts.”

Blickenstaff v. Perrin, 27 Ind. 527; *Atherton v. Fowler*, 46 Calif. 320; *Clyde Mill and Elevator Co. v. Buoy* (Kansas) 80 P. 591; *Baltimore City etc. R.R. Co. v. Sewell*, 37 Md. 443; *Kelsey v. Murphy*, 30 Pa. 340.

In every one of the above states in which said decisions were rendered, a later statute was passed directing the computation of interest from the date of the verdict and there are therefore a number of cases from each of said states wherein interest from such date was allowed, based upon said statute.

The reasons for the disallowance of interest from the date of the verdict, in the absence of a statute, are well stated in the note to I ALR (2), Page 493:

“In *Baltimore City Pass. R. Co. v. Sewell* (1873) 37 Md. 443, after a verdict for the plaintiff, the defendant filed motions for a new trial and in arrest of judgment which were subsequently overruled, and on appeal the overruling of the motions was affirmed. On remand, the trial court, on motion of the plaintiff, entered judgment for the amount of the verdict with interest from the date of the verdict, and the defendant appealed, contending that interest could run only from the date of the judgment. After reviewing the common-law principles and previous decisions the court said: ‘The verdict being an intermediate step in the progress of litigation, liable to be suspended or annulled by the subsequent action of the Court, it does not seem to us consistent with judicial deliberation that the delay occasioned by motions for a new trial, or in arrest of judgment (although such motions should be ultimately overruled) should be made the occasion of an increase of damages, by way of interest, on the presumption that such motions were groundless, and without cause. The motion for a new trial, or in arrest, is a valuable and necessary incident to the right of trial by jury, and no restraint should be placed upon it inconsistent with its freest exercise. The Court cannot assume that in the exercise of a legal right, any party to a cause is actuated by sinister motives.’ The judgment was reversed as to the interest

accruing between the date of the verdict and entry of the judgment, and the cause remanded for modification in that respect. (But see *Hodgson v. Phippin* (1930) 159 Md. 97, 150 A. 118, *infra*, Sec. 10, decided under a later statute expressly authorizing interest from date of verdict.)

“In reversing an order of the trial court allowing interest from the date of the verdict after affirmance of a judgment for the plaintiff, entry of which had been delayed some eleven months by pendency of the defendant’s motions in arrest of judgment and for a new trial, in *Kelsey v. Murphy* (1858) 30 Pa. 340, the court stated that from the definitions of interest, differing but little in essentials, two things must necessarily pre-exist to raise the duty on the part of the debtor to discharge his debt, namely, the ascertainment of the amount to be paid, and its maturity. The court then said: ‘If these essentials are wanting, the debt, although existing, cannot be said to be due and withheld, and the duty to pay has not become imperative upon the debtor. Unliquidated demands, past due, will, if otherwise entitled, bear interest, upon the maxim of *id certum est quod certum reddi potest*. They can be rendered certain. But while the question of indebtedness, under all the ascertained facts in the case is under consideration in the courts, as is the case on a motion for a new trial, the contract of the debtor is suspended. The case is in *gremio legis*, and is presumed to be held under consideration by the ministers of the law. The debtor can neither pay, nor tender, so as to avail anything, even if disposed to abandon the contest. It is em-

phatically, and intruth, the 'law's delay' . . . While, therefor, the very essence of the contest is being considered, and the result is in dubio, it is easy to see, that no duty rests upon the party ultimately liable to pay, as long as that condition lasts, and of course he ought not to be obliged to make compensation to the opposite party, because it exists and continues for a time. That the proceeding is still immature, when a verdict is rendered, is apparent, when we consider that it is in a condition on which no process can issue, and on which no action can be maintained, and is no lien on either real or personal estate. For these and other reasons, neither the common law of England, nor the practice there, or with us, have sanctioned the collection of interest as incidental to a verdict during the pendency of a motion for a new trial.

"In *Kansas City, Ft. S. & M. R. Co. v. Berry* (1895) 55 Kan. 186, 40 P. 288, the trial court, refusing to receive and enter the jury's general verdict for the plaintiff, directed a general verdict for the defendant upon which it entered judgment. The judgment was reversed on appeal and the cause remanded with directions that judgment be entered for the plaintiff for the amount of the verdict, and in entering judgment on the supreme court's mandate, the trial court added interest from the date of the return of the verdict. In modifying the judgment so as to eliminate the interest prior to the entry of judgment, the supreme court observed that while interest on verdicts was expressly allowed by statute in some states it was not in Kansas, and that it was unnecessary to de-

cide whether a verdict bore interest from the time of its rendition, holding that since the verdict was not recognized or received by the trial court until it was done in obedience to the mandate of the supreme court, the verdict was then for the first time given force and vitality.

“And in *Clyde Mill. & Elev. Co. v. Buoy* (1905) 71 Kan. 293, 80 P. 591, wherein, after having obtained a verdict, the plaintiff appealed from an order of the trial court granting the defendant a new trial, and the order of the trial court was reversed with direction to enter judgment on the findings and verdict, and the trial court entered judgment including therein interest on the amount of the verdict up to the date of the judgment, from which action the defendant appealed, it was held that the allowance of interest upon the amount awarded by the verdict from its date to the entry of judgment was not authorized by the statute (Sec. 3590, General Statutes 1901) regulating matters of interest.

“But for Kansas cases under a later statute, see *infra*, Sec. 11.

“It was held in *Campbell v. Elkins* (1905) 58 W. Va. 308, 52 SE 220, 2 LRA NS 159, that in a personal injury action wherein a verdict was rendered for the plaintiff the subsequent rendition of judgment for the amount thereof with interest from the date of the verdict was in strict obedience to the mandate of the statute (Code 1899, c 131, Sec. 16). The court stated: ‘Prior to the Acts of 1882, Chapter 120, amending certain sections of the Code, including sections 14 and 16, this would have been error . . .’

“In *Easter v. Virginian R. Co.* (1915) 76 W. Va. 383, 86 SE 37, a personal injury action, in reversing a judgment of the trial court entered on a verdict previously rendered in favor of the plaintiff and allowing interest from the date of the verdict, it was held that in tort actions interest runs only from the date of the judgment under the statute (Sec. 18, c 131, Code of 1913, Sec. 4927) providing that every judgment or decree for the payment of money, except where it is otherwise provided by law, should bear interest from the date thereof, whether or not it is so stated in the judgment or decree. The court stated that Sec. 14 (Sec. 4923) of the same chapter authorizes a judgment for interest from the date of the verdict only in case of actions founded on contract, and that, the judgment in the present case being for a tort, there was no authority in law for giving judgment for interest, except from the date of the judgment.”

In *Hazel E. Briggs, Admrx. etc., of Ralph Briggs, deceased v. Pennsylvania Railroad Company*, Appt. 154 F (2) 21, the United States Circuit Court of Appeals for the Second Circuit had before it a statute which provides that interest be calculated “from the date of judgment”. The facts of that case as outlined in the opinion of the court were:

“ . . . During the trial a motion to dismiss the suit for lack of jurisdiction was made by the defendant. The court reserved decision on the motion and submitted the cause to the jury, which, on February 15, 1945, returned

a plaintiff's verdict. The motion to dismiss was granted, however, on April 19, 1945, and judgment for the defendant was duly entered. We reversed that judgment on January 7, 1946, and by mandate of January 23, 1946, directed that judgment on the verdict for the plaintiff be entered. We neither did, nor were we requested to, give any directions as to interest. On January 28, 1946, the judgment on our mandate was entered for the amount of the verdict and for interest from the date of the verdict as above stated."

The court then went on to hold:

"The remaining question is whether interest should be allowed from the date the judgment for the plaintiff on the verdict would, in the absence of error in decision, have been entered, viz., the date when the original judgment for the defendant was entered by the order of the court; or from January 28, 1946, the date when judgment for the plaintiff was actually entered after our mandate went down. And if the latter date is the correct one, we must decide whether we now have any power to amend that mandate to make the judgment date nunc pro tunc that of the original judgment and, if so, whether that power ought to be exercised.

"It is true that subsequent events have shown that on the date of the original judgment the plaintiff was entitled to have a judgment entered on the verdict and this judgment would have borne interest until it was paid. But from a practical standpoint, it is equally true that the plaintiff then was 'entitled' only to have the trial judge decide

the pending motions and direct the entry of such judgment as he fairly determined to be lawful and just. That is exactly what the trial judge did. Thereafter the plaintiff was 'entitled' only to take whatever action by way of appellate review the law afforded her. The delay in the entry of the proper judgment was necessary in the sense that time for appellate review was required; it was only after the ordinary appellate proceedings had been completed that the plaintiff's cause of action had reached the point where her right to a judgment on the verdict was judicially established. That judgment was then promptly entered. The date of its entry became the judgment date from which interest is to be computed under the statute. It was, under the circumstances, the first day when the judgment could have been entered."

Although the case involved the question of whether interest should run on the verdict of the jury, the reasoning in a Washington case, *Kiessling v. North West Greyhound Lines*, 229 P2 335, is applicable here.

"The verdict of the jury was returned May 13, 1950. Judgment on the verdict was entered July 7, 1950. The court allowed interest on the amount of the verdict from its rendition to the entry of judgment. There is no statute in this state providing for the accrual of interest from the date of a verdict. Rem. Rev. Stat. Sec. 457 provides for interest on judgments from the date of entry thereof. It is argued that inasmuch as a demand becomes liquidated when a verdict is returned, the rule that interest commences to run from

that time should be applied; also, because verdict when entered upon the execution docket as required by Rem. Rev. Stat. Sec. 431-1, is in effect a lien upon real property, it must follow that interest commences to run from the date of verdict. However, in the cases of Rood v. Horton, 132 Wash. 82, 231 P. 450 (Verdict of the jury) and Phifer v. Burton, 141 Wash. 186, 251 P. 127 (Award by the Court) it was decided that interest ran from the date of the judgment only. The theory upon which the decisions were based was that the demands had not become liquidated until the verdict of the jury or award made by the court had become merged in the judgment thereafter entered. The verdict of a jury or a pronouncement of the court determines and fixes a definite amount of recovery, but the demand is not fully liquidated until the entry of judgment for the reason that the court may grant a new trial because the award is excessive or insufficient; or may raise or lower the amount and afford the party adversely affected the option to accept the same or submit to a new trial of the case, or, in the case of an award by the court, the trial judge may change his mind and make a different award than included in the original pronouncement. We think the principle involved has been settled by Buob v. Frenaughty Machinery Company, 4 Wash. (2) 276, 300, 103 P (2) 325. The case involved a claim for unliquidated damages. The court made an award of damages, but on appeal the case was remanded for further consideration. On the second hearing the amount of the damages was determined but the court did not make any findings or conclusions. Subsequently,

findings and conclusions were made and the judgment entered thereon, which was the third judgment in the case. We held that interest commenced to run from the date of the last judgment because until that time the amount of damages had never become liquidated. This subject is discussed in the Annotation in 1 A.L.R. (2) 492. The author cites a number of cases holding that in the absence of a statute, interest runs from the date of entry of judgment, and not from the date of rendition of verdict. The author also points out that after several of the cases were so decided, the legislatures of the respective states enacted statutes providing for interest from the rendition of the verdict. We are of the opinion that the court erred in entering in the judgment interest from the rendition of the verdict, which should have allowed interest only from the date of judgment."

In *Mundy v. Millsap* (Tenn.) 271 S.W. (2) 857, where a judgment was entered on March 21, 1952, a motion for a new trial filed on April 3rd and the motion overruled on September 6th except that a remittitur in the amount of \$19.00 was ordered, it was held that interest ran from September 6, the date of judgment was filed after overruling the motion for a new trial.

In *State Automobile Mutual Insurance Co. v. Koffenberger*, 83 NE (2) 916 (Ohio), the court entered a nunc pro tunc judgment to carry interest from the date of the verdict. The appellate court held:

“Date from which interest on judgment was allowable was controlled by statute, and under that interest was allowable only from the date of judgment rather than from the date of verdict, so that nunc pro tunc entry ordering judgment to carry interest from the date of the verdict was improper.”

See also the Ohio case of *Sewar v. Schmidt*, 49 N.E. (2) 696.

“*Schullin v. Wabash Railway Company* (1905) 192 Mo. S.W. 1028, the trial court's order setting aside a verdict and judgment rendered the same day and granting the defendant a new trial was reversed on appeal and the case was remanded with directions to set aside the order granting a new trial and to enter judgment for the plaintiff in accordance with the verdict. The plaintiff then moved to set aside the judgment so entered and to enter judgment as of the date of the verdict, such motion being overruled, the plaintiff appealed, contending that judgment should have been entered as of the date when the verdict and original judgment were rendered or that the judgment entered pursuant to the mandate should have been for the amount of the verdict together with interest from the date of the verdict . . . Pointing out that under the statute, all judgments bore interest from the time of their rendition unless otherwise provided in the judgment, the court reasoned that from the time the verdict and judgment was rendered and the motion to set it aside sustained, it was suspended and so remained until judgment was subsequently entered pursuant to the Supreme Court man-

date, and during the interval there really was no judgment in favor of the plaintiff which could be enforced, for the reason that the one which had been rendered in the first instance had been set aside. The court further reasoned that if the plaintiff had submitted to the ruling of the trial court when it sustained the defendant's motion for a new trial and had the case been tried over again, he would have had no claim to interest on the first judgment in the event of his recovery of another verdict, for the reason that it had been set aside. The court accordingly held that upon reversal of the judgment and the remanding of the case with directions to set aside the order granting a new trial and enter judgment for the plaintiff in accordance with the verdict, in the absence of further order to enter judgment as of the date of rendition of the verdict and original judgment, or to enter it for the amount of the verdict with interest from the date of rendition, the only thing the trial court could do, in acting in accordance with the mandate of the Supreme Court, was to enter judgment for the plaintiff only for the amount of the verdict."

CONCLUSION

These cases holding that where a verdict or judgment has been set aside, interest does not commence to run until the order setting it aside has been reversed and the verdict and judgment reinstated, are not only logical, but fair. They are logical because when a judgment or verdict is set aside, there is in reality no judgment which can draw in-

terest. They are fair because any other holding would penalize the party for relying on the judgment of the trial court and would impose upon him the risk of the appellate court reversing the trial court and then if the trial court was reversed of paying the amount of a verdict and being subjected to liability for interest because he saw fit to support the trial court's decision.

It might also be said that to allow interest at this point is to make the substantive rights of the party depend upon the procedure the court adopts. To illustrate, the motion for a directed verdict in this case was made prior to the time that the case was submitted to the jury. Had the court granted the motion at that time, there could be no question whatsoever that no interest would be due for the reason that there would have been no verdict and no judgment entered on a verdict. The court, however, as authorized by the Rules of Civil Procedure, took the motion under advisement and in effect, granted it after the rendition of the verdict. It is submitted that the ruling of the District Court should have related back to the time that the motion for a directed verdict was made and restored the case to that status of no verdict and therefore no judgment, as far as the question of interest is concerned. Otherwise, a litigant would be placed in the position that interest would run when the court

took the motion under advisement and let the matter go to the jury, thereafter setting it aside, but would not run when the judge granted the motion prior to submitting the case to the jury and thereby prevented the rendition of any verdict.

Respondent respectfully concludes that appellant is not entitled to interest on the verdict entered April 23, 1953, until paid, and that the order of the District Court should be sustained.

Respectfully submitted,

HANSON AND BALDWIN

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Defendant and Respondent